Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of: MARITIME COMMUNICATIONS/LAND MOBILE, LLC (*MCLM*): Participant in Auction No. 61 and Licensee of Various Authorizations in the Wireless Radio Services; Applicant for Modification of Various Authorizations in the Wireless Radio Services Applicant with ENCANA OIL AND GAS (USA., INC.; DUQUESNE LIGHT COMPANY; DCP MIDSTREAM, LP; JACKSON COUNTY RURAL MEMBERSHIP ELECTRIC COOPERATIVE; PUGET SOUND ENERGY, INC.; ENBRIDGE ENERGY COMPANY, INC.; INTERSTATE POWER AND LIGHT COMPANY; WISCONSIN POWER AND LIGHT COMPANY; DIXIE ELECTRIC MEMBERSHIP CORPORATION, INC.; ATLAS PIPELINE-MID CONTINENT, LLC; DENTON COUNTY ELECTRIC COOPERATIVE, INC., DBA COSERV; AND SOUTHERN CALIFORNIA REGIONAL RAIL AUTHORITY For Commission Consent to Assignment of Various Authorizations in the Wireless Radio Service	MO&O FCC 18-168 EB Docket No. 11-71 FRN: 0013587779 Application File Nos.[1] (W) 0004030479, 0004144435, 0004193028, 0004193328, (W) 0004354053, (W) 0004309872, (W) 0004310060, 0004315~~5~~4903, 0004315013, 0004430505, (W) 0004417199, (W) 0004419431, (W) 0004422320, (W) 0004422329, 0004507921, 0004153701, (W) 0004526264, (W) 0004636537, (W) 0004604962

To: Marlene H. Dortch, Secretary
Attn: The Commission and the General Counsel
Filed: On ECFS and ULS as captioned above and in FCC 18-168

CONDITIONAL PETITION RECONSIDERATION UNDER 47 USC §405 OF FCC 18-168

ERRATA COPY[*]

Warren Havens, and
Polaris PNT PBC
Polaris PNT 1, PB LLC
Polaris PNT 2, PB LLC
Polaris PNT 3, PB LLC

2649 Benvenue Ave
Berkeley, CA 94704
Phone 510. 914 0910

December 31, 2018

[1] Some dismissed after Docket 11-71 commenced. "W" means shown as withdrawn in ULS.

[*] Caption reformatted; pages #s in Contents added; deletions in strikeout; additions in boxes; some format changes; no change in service completion dates via USPS mail.

CONTENTS

1. SUMMARY AND INITIAL MATTERS

The descriptive table of contents above provides an adequate summary. The below provides an additional summary and related useful (but not required) explanations of the nature of the filing. This filing is by Warren Havens for his own interests, including ownership and other interests in the "Havens" companies described in the *MO&O* FCC 18-168 (the "Order") and by the four "Polaris PNT" legal entities listed on the caption page above (together, "Petitioner"). Herein, "Companies" means the "Havens" companies described in the Order. This is not submitted for the Companies themselves which are subject of a receivership *pendent lite*. Polaris entities. Each of the four "Polaris" entities listed above is a Delaware statutory public benefit entity founded and owed by Havens (together, "Polaris") and holds certain assignments of interests and claims from Havens, and by that shares in legal standing Havens has in this and other FCC matters. (See *Sprint v. APCC*, 554 U.S. 269 (2008)). See also the Cir. Court Challenges.

DC Circuit Court Challenges. In the DC Circuit Court of Appeal, Havens and these Polaris companies (i) on December 27, 2018 filed a Petition for Review against the FCC regarding aspects of the Order involving 47 USC §402(a) and (ii) on December 31, 2018 filed a Notice of Appeal involving 47 USC §402(a) (together, the "Cir. Court Challenges") copies of which are provided as Exhibit A and B hereto (without their attached copy of the Order). The "conditional" aspect of this Petition (as stated in the caption) is related in part to the Cir. Court Challenges ~~and is~~ described below.

Order aspects not challenged. As noted in the Cir. Court Challenge, the Order decided in accord with principal positions and requests in the challenges to FCC 15M-14 filed for Havens and the Companies including that FCC 15M-14 did not set forth facts and law to support the an action by the Commission to issue a hearing designation order and commence a formal hearing on any issue of character to hold FCC licenses of Havens or any of the Companies; that the ALJ improperly asserted that FCC rule §1.251(f)(3) (which the ALJ unlawfully modified in FCC 15M-14) did not support any charge as to character to hold FCC licenses; and that Havens was not involved

in certain proceedings before the ALJ Sippel that involved legal counsel Havens had arranged, James Stenger, regarding some charges by the ALJ in FCC 15M-14. These aspects are not challenged herein (or in the Cir. Court Challenges). Order aspects challenged and relief requested. Petitioner challenges the Order under the standards and scope set forth in the Cir. Court Challenges (Exhibits A and B) and in accord with 5 USC §706, FCC rule §1.016, 47 USC §405 and other relevant law. Petitioner requests that the Order be found invalid and/or void on the grounds herein, ~~in~~ largely shown in Table of Contents above.

Order re-opens past matter - including for Petitioner. See section 8 below regarding the second inquiry: the prospective inquiry described in the Order. While unlawful, this second inquiry re-opens the matters described in the Order for the inquiry for Petitioner to re-assert factual and legal challenges, and bring new ones, including in this Petition. In this regard, herein, and in the Cir. Court Challenges, Petitioner refers to the need and right to proceed against the FCC in a US District Court case, with a trial and pre-trial discovery. In this regard, in *Cox v. United States*, 332 U.S. 442 (1947), the Supreme Court case involved the rights of defendants in a federal administrative case. The Court affirmed the right of the defendants to have the administrative order "submitted to the trial judge and the [appellate] courts" for review, protections beyond those provided within the administrative process; and where warrantless searches occur and are challenged in a subsequent tort action (including § 1983 actions), "the reasonableness of a search or seizure is a question for the jury;" and in determining reasonableness, the jury also gets to pass on "the existence of probable cause, . . . even though [that issue] is normally determined by a court during the warrant application process." The factual record shows that it is the FCC and not Petitioner that needs to be subject to inquiry and discovery of records and testimony, including as indicated herein in relation to the whistleblower related claims.

Initial Petition, and other Petitioner filings. Petitioner references his initial petition of the FCC 18-168 (the "Order") filed on December 27, 2018, a copy of which is Exhibit C hereto. He

incorporates herein the text that is of the nature of a petition for reconsideration, and the supporting appended matter (but not any other text, including requests for voluntary FCC action, and his comments regarding a spectrum set aside for PTC). Petitioner also, for reasons indicted in the "Order re-opens" subsection above, references herein all his past filings before the FCC and other authorities that are subject of what the Order re-opens and suggests by the prospective "inquiry."

Classes of challenges. Petitioner has classes of challenges to the Order and the Commission and its delated authorities ("DAs") (together, the "FCC") (herein "Claims"):

> (1) Claims for which discretionary action by the FCC and Petition may result in resolution before the FCC or in alternative dispute resolution proceedings that include the FCC; (2) Claims for which evidentiary proceedings (discovery and a trial) in a US District Court as to *ultra vires* FCC action are *not* needed;[2] and (3) All other claims.

Some of the Claims involve Constitutional Questions (see below). By the day of this Petition filing, Petitioner intends to have has filed against the FCC and the United States in the US Court of Appeals for the DC Circuit that involve some of Claims (2) and (3).

> (a) A Petition for review of some Claims involving aspects of the Order under 47 USC §402(a) that involved ultra vires rule changes and other aspects of the Order not under §402(b), and (b) A Notice of Appeal of other Claims involving other aspects of the Order under 47 USC §402(b) involving licensing or potential licensing matters. [3]

Conditional aspect of this Petition and of the Cir. Court Challenges. Petitioner reserves rights

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[2] See, e.g., "An Introduction to Judicial Review of Federal Agency Action," Congressional Research Service, 2016:

> [E]ven lacking an express statutory cause of action, individuals may seek "nonstatutory" review of a agency action that is "ultra vires."48/ [¶] /48/ *Commonwealth of Puerto Rico v. United States*, 490 F.3d 50, 59 (1st Cir. 2007) ("The basic premise behind nonstatutory review is that, even after the passage of the APA, some residuum of power remains with the district court to review agency action that is ultra vires.") (quoting R.I. *Dep't of Envtl. Mgmt. v. United States*, 304 F.3d 31, 44 (1st Cir. 2002)); *R.I. Dep't of Envtl. Mgmt,* 304 F.3d at 42....Such actions are based on the grant of general federal-question jurisdiction under 28 U.S.C. §1331 and the inherent equity powers of the federal courts.")....*Chamber of Commerce v. Reich*, 74 F.3d 1322, 1327 (D.C. Cir. 1996)..

[3] In *Tribune Co. v. F.C.C.,* 133 F.3d 61, 328 U.S. App. D.C. 198 (D.C. Cir., 1998), the DC Circuit Court explained: " 4. Tribune... appealed the Commission's order ...pursuant to § 402(b), and... petitioned for review of that order ...pursuant to 47 U.S.C. § 402(a)....[A] claim directed to the same matters may be brought only under one of the two provisions." Petitioner does not bring the *same* claims directed to the *same* matters before the DC Circuit Court, but brings *different* claims on *different* matters under the Order.

to dismiss any Claims submitted to the FCC or to the DC Circuit Court including where that may resolve ~~in~~ an apparent or actual parallel proceedings, or if any Claims before the court are found to be unripe or lacking in "exhaustion" of administrative remedies which in part depends upon the FCC responses to this Petition and these two filings in this Court. [4] In this regard, the US Supreme Court held in *Darby v. Cisneros*, 509 U.S. 137 (underlining added):

> [U]nder the APA, Congress effectively codified the doctrine of exhaustion of administrative remedies in § 10(c).... A]n appeal to "superior agency authority" is a prerequisite to judicial review only when expressly required by statute or when an agency rule requires appeal before review and the administrative action is made inoperative pending that review. Courts are not free to impose an exhaustion requirement as a rule of judicial administration where the agency action has already become "final" under § 10(c).

The Order has not been made inoperative, and it results from an appeal to the highest agency authority, and thus, there is no further "exhaustion" required. Also, the US Supreme Court held in *McKart v. United States*, 395 U.S. 185 (1969) that exhaustion may not be required where it (1) would cause *irreparable injury*, (2) the agency appears to *lack jurisdiction* over the matter, (3) agency *expertise* is not implicated, (4) a further administrative record would not assist the reviewing court, or (5) exhaustion would be *futile*.[5] Petitioner alleges all of these five of these exhaustion exceptions apply to the subject Order - to the extent is time barred and/ or void for illegality, lack of jurisdiction or other basis. In addition, as 5 U.S.C. § 551 provides, final agency action can include inaction such as failure to make an agency rule, order, license, sanction or relief. 5 U.S.C. § 706(1) requires a reviewing court to compel agency action that is "unlawfully withheld or unreasonably delayed." *In Norton v. Southern Utah Wilderness Alliance,* 542 U.S. 55 (2004), the US Supreme Court held that an inaction claim may challenge an agency's failure to take a legally required and discrete action.

Legal Standing. Havens and the Polaris entities each has legal standing to challenge the Order,

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[4] The FCC Office of General Counsel declined to stipulate or discuss a potential stipulation with Petitioner, as Petitioner requests, that may have eliminated or reduce the matters in this paragraph of the text above. Petitioner indicated this in his action before this Court.

[5] See, e.g., *United States v. Williams*, 514 U.S. 527 (1995) (futility established), and futility may occur when agency administrative processes cannot provide the relief sought by the petitioner. *Honig v. Doe*, 484 U.S. 305, 327 (1988).

including hereby, as a "party aggrieved" for economic reasons, and due to violations and deprivations under the Order of rights protected by US Constitution including its 1st, 5th and 14th Amendments, as well as under the public standard.[6]

[End of summary and initial matters. Substance follows]

/ / /

[6] The broad legal-standing that applies here to Petitioner is described in *Maier v. F.C.C.,* 735 F.2d 220 (7th Cir., 1984) (the standard below applies to actions before the FCC and in appeals of FCC decisions) (underlining added):

> In *Scripps-Howard Radio v. FCC*, 316 U.S. 4... (1942), the Supreme Court discussed the matter of standing to seek judicial review under the Communications Act. After first noting that the Communications Act was enacted to "protect the public interest," the court stated: "By section 402(b)(2) Congress gave the right of appeal to persons 'aggrieved or whose interests are adversely affected' by Commission action. But these private litigants have standing only as representatives of the public interest." Id. at 14, 62 S.Ct. at 882 (citations omitted). 10/ The Court went on to compare orders reviewable under section 402(a), under which review is sought in this case, with orders reviewable under section 402(b). The Court examined the legislative history of the Communications Act and concluded that the difference between the two sections had no relation to the scope of the judicial function which the courts were called upon to perform.... As the legislative history of the Act plainly shows, Congress provided the two roads to judicial review only to save a licensee the inconvenience of litigating an appeal in Washington in situations where the Commissioner's order arose out of a proceeding not instituted by the licensee. Id. at 15-16, 62 S.Ct. at 882-883. / n10. Since the Scripps-Howard case was decided, Sec. 402(b) has been amended. What was once Sec. 402(b)(2) is now Sec. 402(b)(6)....the current and former versions of Sec. 402(b) are "substantially the same."

In this regard, the 4 Polaris entities are statutory public benefit ("public interest") entities focused on radio spectrum services. More than other private companies, these Polaris entities by charter and statute must serve the public benefit or interest in FCC (and NTIA) spectrum-related matters.

2. REFERENCE AND INCORPORATION OF INITIAL PETITION AND CERTAIN PAST PLEADINGS

See "Initial Petition, and other Petitioner filings" in the ~~Introduction~~ Summary... section above.

3. TIMING, PAGE LENGTH, MULTI-PROCEEDINGS, OTHER PROCEDURAL ISSUES, AND REQUEST

The Order involves the following: (1) The Order itself, FCC 18-168, 30 pages, 223 footnotes, (2) its subject, FCC 15M-14, 14 pages, 77 footnotes, by ALJ R. Sippel, (3) FCC 12-26: 8 pages, 45 footnotes, by the Commission (TX-AHRA sanction order); (4) FCC 11-116: 6 pages, 35 footnotes, by the Commission (TX-AHRA pre-sanction order), (5) various other decisions involving Petitioner and Companies. In total, hundreds of pages -- single spaced. Combining in one Order multiple decisions in multiple proceedings is contrary to FCC precedent including ones that instructed Havens to not cite to matters on one proceeding, in another: see e.g., Order, 27 FCC Rcd 3256, DA 12-537, rel. April 4, 2012. The Order thus violates FCC precedent and for this reason alone, is improper and should be rescinded. In addition, it is prejudicial to hold Havens to a response that is limited to the 25-page limit in FCC rule §1.106, and to the 30 day filing period in §1.106. These prejudicial errors are compounded by the FCC decision to issue the Order at time when the 30 days ended in and took up the entire year-end holiday season. See also the tolling section herein as to additional FCC-caused prejudice. Request. Thus, Petitioner requests that the FCC grant an additional month of time, and no less than 75 pages in countable pages of text, for Petitioner to submit a final, replacement petition for reconsideration (and other relief).

4. CONSTITUTIONAL VIOLATIONS RENDER THE ORDER VOID

Petitioner's claims include that the Order and its foundation violate the US Constitution in various ways. While there is a strong presumption favoring the availability of judicial review in American administrative law,[7] the presumption in favor of reviewability is strongest for a claim that

[7] See Administrative Procedure Act ("APA"), § 702, 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."). See also *Califano v. Sanders*, 430 U.S. 99, 104 (1977) ("[The APA] undoubtedly evinces Congress' intention and understanding that judicial review should be widely available to challenge the actions of federal administrative officials.");

the agency action in question is unconstitutional. *Califano v. Sanders*, 430 U.S. 99, 109 (1977).[8] / [9]

A. The "Substantial Service" Standard, at the Core in this Case, is Unconstitutional.

The Order and its underlying foundations cited to in large part rest upon the FCC's "substantial service" standard for AMTS license "construction"- service commencement requirements and deadlines. That standard is overly vague and unconstitutional. Thus the Order is unconstitutional and void. As explained in *Fibertower v. FCC,* 782 F.3d 692:

> The Commission has defined "substantial service" as "service which is sound, favorable, and substantially above a level of mediocre service which just might minimally warrant renewal."

This standard is bereft of US Supreme Court's required "intelligible principle... standard or procedure" (see immediately below) and also is impossible to perform (see second below). From: Randolph J. May, "A Modest Plea For FCC Modesty Regarding The Public Interest Standard," Administrative Law Review [60:4, 2008] (underlining added, italics in original):

> The Supreme Court.... [in 1] *J.W. Hampton, Jr., & Co. v. United States*... declared: "If Congress shall lay down by legislative act an *intelligible principle* to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power." 276 U.S. 394, 409 (1928) (emphasis added)....(in 2) A.*L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 550–51 (1935)...finding Congress's delegation of legislative power to the Executive Branch was unconstitutional because the Legislative Branch did not provide any standards or procedures by which to govern the President's determinations...

In the case of the "substantial service" standard, not only did Congress not provide any "intelligible principal" "standards or procedures" for the FCC to follow, but the FCC itself created this standard with no "intelligible principle... standard or procedure," thus it is doubly unconstitu-

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[8] Precluding review of constitutional questions would be an "'extraordinary' step" requiring proof by "'clear and convincing evidence " of congressional intent) (quoting *Johnson v. Robison*, 415 U.S. 361, 366-67 (1974): contention that a statute bars judicial review of constitutionality of veterans' benefits legislation raises questions as to the constitutionality of that statute). See also *5 K. Davis, Administrative Law Treatise* § 28:1 (2d ed. 1984) § 28:3, at 259 (decisions about constitutionality have the strongest claim for reviewability).

[9] In *Harmon, Iii v. Abramowitz v. Brucker*, 355 U.S. 579 (1958), the US Supreme Court held:

> Generally, judicial relief is available to one who has been injured by an act of a government official which is in excess of his express or implied powers. *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 108, 23 S.Ct. 33, 38, 47 L.Ed. 90; *Philadelphia Co. v. Stimson*, 223 U.S. 605, 621-622, 32 S.Ct. 340, 345, 56 L.Ed. 570; *Stark v. Wickard*, 321 U.S. 288, 310, 64 S.Ct. 559, 571, 88 L.Ed. 733.

tional. This standard provides no fair-warning notice of what is allowed or prohibited, which violates due process requirements in the Fifth Amendment.[10]

Supporting the above *J.W. Hampton* analysis of the US Supreme Court, the DC Circuit Court similarly found (underling and text in brackets added):

> [T]here is, to be sure, an outer limit to that deference imposed by the Administrative Procedure Act. A substantive regulation must have sufficient content and definitiveness as to be a meaningful exercise in agency lawmaking. It is certainly not open to an agency to promulgate mush and then give it concrete form only through subsequent less formal "interpretations." ... That technique would circumvent section 553, the notice and comment procedures of the APA. 3/ ----- [¶] / 3/ In that regard, surely the APA imposes a considerably tighter restriction [on regulation promulgation] than does the non-delegation doctrine as applied to legislation. *See Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.,* 448 U.S. 607, 100 S.Ct. 2844, 65 L.Ed.2d 1010 (1980). Indeed, a broad delegation of substantive authority may require stricter procedural safeguards.

Paralyzed Veterans v. D.C. Arena, 117 F.3d 579 (D.C. Cir., 1997). Under this test the FCC "substantial service" standard regulation is impermissible "mush," the opposite of the "tighter" standard required for APA regulation promulgation versus the underlying Congressional legislative mandate in the Communications Act, as amended, to issue and regulate licenses "in the public interest," and under the 47 USC 309(j) performance standard[11] that the FCC has never implemented in a needed revision or replacement of the "substantial service" standard.

This substantial service language is also a nonsense and creates and an impossible standard because the service must be "above a level... which...might. warrant renewal." If service warrants renewal, but it must be better than that, then that better service is required to warrant renewal, but this language means it must be better than that, and so on: there is no end to this betterment

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[10] It thus has allowed the FCC to do what its Commissioners or DA staff likes or dislikes in the proceedings underlying this Order, and this in turn has provided fertile ground for other FCC actions beyond lawful authority and constraints: besides this §4, see the list of some of the ultra vires actions in ~~Appendix~~ Exhibit B, §5 below, and passim herein.

[11] (j) Use of competitive bidding. [....¶] (4) Contents of regulations. In prescribing regulations pursuant to paragraph (3), the Commission shall- [...¶] (B) include performance requirements, such as appropriate deadlines and penalties for performance failures, to ensure prompt delivery of service to rural areas, to prevent stockpiling or warehousing of spectrum by licensees or permittees, and to promote investment in and rapid deployment of new technologies and services....

required. Impossibility is also contrary to constitutional principles and "morality of law."[12]

Thus, this standard is unconstitutional and void, and since it underlies a large part of the Order and its underlying actions and decisions, those are void.

B. Violation of Due Process for Failure of Any Fair Warning

This violation is first in the ALJ Order 15M-14: (see, e.g., the letters from Havens to FCC Office of General Counsel, soon after the ALJ terminated docket 11-71,) cited in the Order) and now in the subject Order FCC 18-168. In *Garris v. Governing Bd. of the S.C. Reinsurance Facility*, 319 S.C. 388 (S.C. 1995), the court observed, with case review, that before the agency proceedings, the licensee has to be provided with a notice regarding the facts which warrant action for withdrawal, suspension, revocation, or annulment of a license in writing and an opportunity to achieve compliance with all lawful requirements: which the Order fails.[-] See also U.S. v. Utah., 384 U.S. 394.

C. Violation of Due Process for Unlawful Takings

Imposition of APA sanctions are a form of government takings under the Fifth Amendment. Since the sanctions, including threats to chill whistleblowing or clear for good cause, are at best baseless, and are per the evidence retaliatory and apparent malfeasance, these are unlawful takings in violation and deprivation of the Fifth Amendment protections, and these too render the Order void.

5. WHISTLEBLOWER ATTACKS AND CHILLING IN FCC 15M-14 AND THE ORDER RENDERS THE ORDER VOID AND VIOLATES THE COMMUNICATIONS ACT AND COMPETITIVE LAW

The Order's prospective "inquiry" based on re-opening past FCC decisions and even matters

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[12] See, e.g., Tucker, Edwin W. (1965) "The Morality of Law, by Lon L. Fuller," Indiana Law Journal: Vol. 40: Iss. 2, Article 5, at: http://www.repository.law.indiana.edu/ilj/vol40/iss2/5) (underlining and text in brackets added):

> For a principle to be acceptable as a law, he states that it must be measured in terms of the following eight standards: [....¶] (6) Emphasizing that law is tied to the capabilities of human beings, Fuller insists that those who prescribe the norms required of individuals must refrain from imposing impossible standards of action or inaction. A stated norm which demands an absurd course of action would violate Fuller's idea of the "internal morality of law." [..¶] ..Fuller has explained... what is substantially the practice presently being observed by most of our jurists...the approach of the Supreme Court of the United States in reference to the procedural [due process] requirements demanded by the fifth and fourteenth amendments to the federal constitution.

outside of FCC jurisdiction and reach, permits Petitioner to do the same including, initially, in this Petition. In terms of Petitioner's charge that the Order and underlying FCC 15M-15 are devised for unlawful retaliation of Petitioner's demonstrated meritorious whistleblowing (see list in the Cir. Court Challenges). Among these is the FCC ultra vires rule change of core rules for designated entity bidding and payment credits in auctions that the FCC commenced for MCLM in Auction 61 and continued with ever since. For like reasons and effect, the FCC also issued an ultra vires "Second Thursday" decision to further grant unlawful boons to MCLM at the end of year 2016 in docket 13-85 (that was parallel to and a spin off from 11-71). This ultra vires "Second Thursday" decision, and the noted ultra vires rule change, are directly contrary to Congressional mandates in 47 USC §309(j) that requires implementation of bidding credit rules and procedures, and enforcement of them for the lawful and unlawful bidders that certified and used such bidding credits. These are also in violation of controlling case law cited by Petitioner's counsel in the Ninth Circuit writ case referenced in the Order, including *Superior Oil Co. v. Udall*, 409 F.2d 1115, 1120 (D.C. Cir. 1969); *McKay v. Wahlenmaier*, 226 F.2d 35, 41 (D.C. Cir. 1955); and *Biltmore Forest Broadcasting FM, Inc. v. FCC*, 321 F.3d 155, 161 (D.C. Cir. 2003) . These also violate US Supreme Court holdings, e.g., in Motor Vehicles Manufacturers v. State Farm, 463 U.S. 29 (1983), involving invalidation of an agency's rule

> ....[when] the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

In addition the ALJ, the Wireless and Enforcement Bureaus, and the Commission never sanctioning of MCLM (or its predecessor Mobex or successor Choctaw) for the cheating in Auction 61, the unlawful change of control in MCLM, the perjury and hundreds of false and fraudulent licensing filings to obtain and keep nationwide AMTS site based licenses for decades, including during the 11-71 proceeding for years before it eventually admitted that the vast majority of these were automatically terminated due to then-admitted permanent abandonment years earlier--all of which Petitioner "blew the whistle" ~~about~~ for decades, further make clear the assertion of this section.

6. TIME BARS RENDERS THE ORDER VOID

A. First, see the Initial Petition (Exhibit C) text on time bars.

B. See also the letters from Havens to the Office of General Counsel, submitted soon after the ALJ terminated docket 11-71, cited in the Order at page [- - -]. These show why FCC 15M-14 is time barred (and barred due to violation of due process).

C. 47 USC §405(b) based time bar. In addition to the preceding A and B: This statute mandates that the Commission to "issue an order granting or denying" a petition for reconsideration within 90 days, 47 U.S.C. § 405(b)(1), and provides that any such order granting or denying a petition shall be a final, appealable order, id. § 405(b)(2). The FCC missed this deadline by over 3 years in issuing the Order, and still the Order does not complete a decision on aspects of what it addresses in its caption and gravamen, FCC 15M-14. In this regard, as shown below, the compelling case for a court mandate to require the FCC to decide, also is a compelling case for a time bar for any valid decision, where the subject of the proceeding is not rulemaking of general application but private party adjudication especially regarding an ALJ interlocutory decision where case law, and the nature of interlocutory appeals as a matter of right (the case here) require near immediate Commission Action (less than 90 days where the proceeding is ongoing, as was the case here).

From Congressional Research Service, October 5, 2018, R45336, "Agency Delays in Violation of a Statutory Deadline" (underlining added):

> When Congress imposes an express statutory deadline on the agency and the agency misses that deadline, courts are more receptive to claims to compel the agency to act. Indeed, some courts have taken the position that courts must issue an order compelling agency action whenever a court finds that an agency has violated a statutory deadline.125/
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> The leading case advancing that view is the Tenth Circuit's decision in Forest *Guardians v. Babbitt* [cited below]....[¶] The Tenth Circuit held that it lacked discretion when a statutory deadline is violated because section 706(1) states that courts "shall . . . compel agency action unlawfully withheld," and, quite simply, "'shall' means shall."....Because Congress had already established the time by which the agency must act through a statutory deadline, *Forest Guardian*s held that balancing the TRAC factors is inappropriate.132/ The Ninth Circuit follows the Forest Guardians approach.

From *Forest Guardians v. Babbitt*, 174 F.3d 1178 (10th Cir., 1999) (underlining added):

> ...[W]hen an entity governed by the APA fails to comply with a statutorily imposed absolute

> deadline, it has unlawfully withheld agency action and courts, upon proper application, must compel the agency to act. [¶] [W]hen Congress by organic statute sets a specific deadline for agency action, neither the agency nor any court has discretion. The agency must act by the deadline. If it withholds such timely action, a reviewing court must compel the action unlawfully withheld. To hold otherwise would be an affront to our tradition of legislative supremacy and constitutionally separated powers. [....] [¶] Section 706 requires that a reviewing court "shall compel agency action ... unreasonably delayed," .... [¶] Neither TRAC [See FN 18, 19 below] nor any of the cases it relied on to "discern the hexagonal contours of a standard" involved agency inaction in the face of a mandatory statutory deadline. 19/ TRAC, 750 F.2d at 80. ... When an agency fails to meet a concrete statutory deadline, it has unlawfully withheld agency action. [¶] 18/ The six factors ...in Telecommunications Research Action Ctr. v. FCC, 750 F.2d 70, 80 (D.C.Cir.1984) ["TRAC "].... [¶] 19/ The FCC delay at issue in TRAC was not governed by any mandatory deadline....

FCC 15M-14 was an interlocutory decision of the kind that permitted interlocutory challenges thereto as a matter of right, and Havens and Companies submitted such challenges, and the foregoing comprises the substance of the Order (but for its including of other matters from other proceeding in violation of due process fair warning, and other bars). An interlocutory decision and such challenges thereto must be very promptly decided upon, not in 90 days or 18 times that, as in the case of the Order: This is explained by the subject ALJ who issued FCC 15M-14 as follows (citing other authorities). : ~~[INSERT]~~ "ALJ [and agency] has the obvious duty to facilitate a prompt appeal" and decision after an exclusion: p. 243, 2 BYU J. Pub. L. 219. http://digitalcommons.law.byu.edu/jpl/vol2/iss2/3

D. Related to time bars, is procedural violations. In the US Supreme Court decision *Head v. New Mexico Board*, 374 U.S. 424, 83 S.Ct. 1759, 10 L.Ed.2d 983 (1963), Justice Brennan wrote (underlining and text in brackets added):

> For the [Federal Communications] Commission has long disclaimed the effectiveness of ... 'the cumbersome weapons of ... license refusal....' *Regents of the University System of Georgia v. Carroll*, 338 U.S. 586, 602, 70 S.Ct. 370, 378, 94 L.Ed. 363.1 This obstacle led the Congress in 1960, on the recommendations of the Commission and the Attorney General,[] to amend the Communications Act to authorize the Commission to impose money forfeitures, 47 U.S.C. § 503(b), and to grant short-term licenses, 47 U.S.C. § 307(d).... [and] also strengthened the Commission's preexisting power to issue cease-and-desist orders, 47 U.S.C. § 312(b). The Commission was thus expressly given more discriminating tools 'in dealing with violations....

In this case, the Order --(apart from the many threshold defects discussed herein, and there being no actual violations, but instead effective voluntary actions to support Commission goals in

docket 11-71 and otherwise)-- fails to indicate any such Section 312 "discriminating tool" but suggests potential, down the road, "cumbersome weapon... license refusal" (and for potential facts not currently found, which is among the many threshold defects). The Order and its subject FCC 15M-14 fail to consider and apply or even suggest lesser remedies for the (falsely) alleged breaches of Havens and Companies, short of removal from the 11-71 hearing and the initial inquiry under FCC 15M-14, and now a second one under the Order regarding licensee "character" issues. Thus, the FCC has violated the Supreme Court explanations as to how the FCC should act in cases of apparent or alleged breaches by a party of FCC rules or law. And this, in turn, contributed to the delays that cause time bars.

7. LACK OF LICENSES RENDERS THE ORDER VOID

Under the APA, an agency can impose a sanction related to licenses upon a person that does not hold any licenses or control of licenses. Because Petitioner Havens does not currently hold licenses or control in any (but for an issued experimental license for in-premise testing issued to one of Havens's Polaris entities), the Order is void for this reason.

8. THE SECOND INQUIRY IS REVERSIBLE ERROR AND UNLAWFUL UNDER THE APA

The Order is a decision on FCC 15M-14's two component orders (1) removal from the 11-71 hearing, and (2) referral to the Commission of the "character" issue for hearing designation order. By the Commission, after over 3.5 years, the Commission upheld the removal, but did not find cause to issue the HDO (hearing designation order, as meant in 47 USC §312)). Each of the two was a type of sanction under the Administrative Procedure Act (as "sanction" is broadly defined in 4 USC §551). The Order does not support with relevant authority the right of the FCC to undertake the "inquiry" or investigation, and the APA allows none in this case: The character issue was before the Commission and it decided there was no sufficient cause for an HDO. Having made that decision, the Commission cannot commence a second inquiry. Apart from being time and otherwise barred (as discussed in other sections herein), this is a type of unlawful retrial, and an unlawful proceeding for

search and seizure of papers (records) without probably cause. (If there was probably cause, the time for the FCC to assert and act on that was years ago.)

In this regard: See the Introduction section above regarding the Order's reopening of past matters and proceedings, including for Petition to reassert past and new challenges and positions. Herein, and in the Cir. Court Challenges, Petitioner refers to the need and right to proceed against the FCC in a US District Court case, with a trial and pre-trial discovery. In *Cox v. United States*, 332 U.S. 442 (1947), the Supreme Court case involved the rights of defendants in a federal administrative case. The Court affirmed the right of the defendants to have the administrative order "submitted to the trial judge and the [appellate] courts" for review, protections beyond those provided within the administrative process; where warrantless searches occur and are challenged in a subsequent tort action (including § 1983 actions), "the reasonableness of a search or seizure is a question for the jury;" and in determining reasonableness, the jury also gets to pass on "the existence of probable cause, . . . even though [that issue] is normally determined by a court during the warrant application process." It is the FCC and not Petitioner that needs to be subject to inquiry and discovery of records as indicated herein in relation to the whistleblower related claims.

9. FACTUAL AND LEGAL ERRORS AND OMISSIONS REQUIRE REVERSAL

9.a. Attributing Alleged Improper Pleadings by Attorneys to Havens, Even if Allegations Are Correct (They Aren't) Requires Reversal, Especially Where No Action Taken Against Attorneys in FCC 15M-14 or the Order

This attribution to Havens violates US Supreme Court holdings in *Goodyear v. Haeger,* 137 S.Ct. 1178 (2017) (underling added, referencing aspects of *Haeger* applicable here):

> Federal courts possess certain "inherent powers," not conferred by rule or statute, "to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link v. Wabash R. Co.,* 370 U.S. 626, 630–631, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962). That authority includes "the ability to fashion an appropriate sanction for conduct which abuses the judicial process." *Chambers v. NASCO, Inc.,* 501 U.S. 32, 44–45, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991). And one permissible sanction is an "assessment of attorney's fees"—an order, like the one issued here, instructing a party that has acted in bad faith to reimburse legal fees and costs incurred by the other side. Id., at 45, 111 S.Ct. 2123. ¶¶ This Court has made clear that such a sanction, when imposed pursuant to civil procedures, must be compensatory rather than punitive in nature. See *Mine Workers v. Bagwell,* 512 U.S. 821, 826–830, 114 S.Ct. 2552,

> 129 L.Ed.2d 642 (1994) (distinguishing compensatory from punitive sanctions and specifying the procedures needed to impose each kind).[] In other words, the fee award may go no further than to redress the wronged party "for losses sustained"; it may not impose an additional amount as punishment for the sanctioned party's misbehavior. Id., at 829, 114 S.Ct. 2552 (quoting *United States v. Mine Workers*, 330 U.S. 258, 304, 67 S.Ct. 677, 91 L.Ed. 884 (1947)). To level that kind of separate penalty, a court would need to provide procedural guarantees applicable in criminal cases, such as a "beyond a reasonable doubt" standard of proof. See id., at 826, 832–834, 838–839, 114 S.Ct. 2552.

In addition, a federal court (or here the FCC federal agency) cannot jump over the attorney to attribute blame to the client, absent a finding the attorney could not have performed required diligence, which is not in this case here. This is clear by a review of FRCP Rule 11 since FCC formal hearings essentially follow the procedures and standards of FRCP.[13] From *The Journal of the Legal Profession* [Vol. 13:319. 1998], "The Improved FRCP Rule 11" (underlining added) (minor edits, no substantive changes):

> An attorney has a "professional duty to dismiss a baseless motion or lawsuit, even over a client's objection." 610 F. Supp. at 661. Furthermore, the duty is to dismiss promptly if the client's position is without merit. Id. Courts have also held that if a party waits too long to file a Rule 11 suit, the court may dismiss the claim because it is "more retaliatory than substantive in nature." *Stevens v. Lawyers Mut. Liab. Ins. Co. of N.C.,* 789 F.2d 1056, 1061 (4th Cir. 1986) (8 months too long). The courts' standard under Section 2281 for frivolous claims is that a claim is frivolous only if "its unsoundness so clearly results from the previous decisions of the court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy. *Coosby v. Osser,* 409 U.S.512 (1973) (citing *ex parte Povesky*, 290 U.S.30 (1933)).

Thus, the Order errs in "jumping over" the attorneys accused (even if the accusations were correct, which they are not), to the client, Havens (who also is not an attorney), and the Order also is improperly "retaliator," as is FCC 15M-14 for long delays before the attorney accusations are made. Also see I*n the Matter of Certain Point of Sale Terminals and Components Thereof,* Inv. No. 337-TA-524, Order No. 48, 6-7 (Int'l Trade Comm'n June 7, 2005): the ALJ found that Verve's counsel conducted no independent prefiling investigation, and merely relying on a client without conducting an independent investigation into the law and facts demonstrates recklessness and bad faith. And in *Healey*, 947 F.2d at 622, "Under federal precedent, a party should receive "a proper opportunity to oppose

[13] Applicable FCC rules include §§1.251(f)(1)-(2); 1.52, and 1.24.

the motion for sanctions and to augment the record with appropriate countervailing evidence" (from the New York Law Journal, August 26, 2013). FCC 15M-14 and the Order err in failure to provide this proper opportunity, and it is now ~~t~~ over 4 years late, thus impermissibly "retaliatory" as explained in *Stevens v. Lawyers,* above.

Re: October 27, 2014 Motion for Summary Decision. At paragraphs 62-68, the Commission discusses in detail the October 27, 2014 Motion for Summary Decision filed by James Stenger, attorney at the Chabourne and Parke law firm, for Environmentel LLC and Verde Systems LLC, and the appeals filed by the Chadbourne ~~and Parke law~~ firm (Interlocutory Appeal filed April 29, 2015) and Lowenstein Sandler law firm (Supplement to Interlocutory Appeal filed September 11, 2015 and related Reply filed October 8, 2015) that discuss the October 27, 2014 motion and FCC 15M-14 and the 11-71 hearing. The gravamen of the Order appears to be this October 27 Motion filed by James Stenger and the arguments in the appeals filed by Chadbourne and ~~Parke and~~ Lowenstein Sandler regarding said motion. The Order states at paragraph 62, "In excluding Havens and his companies from the Maritime Proceeding, the Judge placed principal emphasis on the October 27 Motion," and that "We have examined the circumstances surrounding the filing of this pleading and agree with the Judge that these circumstances reveal the kind of contemptuous and disruptive conduct that constitutes a reasonable basis for excluding a party from a hearing proceeding." However, for reasons given below, there is no support for finding the October 27 Motion as sufficient grounds for excluding Havens or the "Havens" companies, or for the Commission to find it as a basis for upholding the Judge's decision excluding the parties or for commencing an inquiry by the Enforcement Bureau or otherwise attributing it to Havens and the "Havens" companies.

First, FCC Rule Section 1.251(a)(i) allows filing of a motion for summary judgment up to 20 Days before hearing. ~~The~~ Chadbourne's ~~and Parke~~ May 22, 2015 Petition for Reconsideration filed with Judge Sippel pointed that out (see Petition for Reconsideration at its page 4). The motion was filed on October 27, 2014, more than 20 days prior to the December 9, 2014 hearing, in accordance

with Section 1.251(a)(1): "Any party to an adjudicatory proceeding may move for summary decision of all or any of the issues set for hearing. The motion shall be filed at least 20 days prior to the date set for commencement of the hearing…." Judge Sippel did not have authority to disable that rule or prohibit a party from proceeding under it. Since Section 1.251(a)(1) allows a party to file a motion for summary decision if it is timely and procedurally proper, the Commission's interpretation of what Judge Sippel meant by his statement prohibiting motions for summary decision is against that rule.

Further, if Judge Sippel thought a motion for summary decision filed by James Stenger or anyone else was not permitted, then all he had to do was dismiss it. There could be no delay caused by it and no harm to any parties by merely dismissing it. Judge Sippel could have told James Stenger at the time of filing of his October 27, 2015 Motion that it was not permitted and dismissed it at that time. Instead, Judge Sippel took no action on it at or near that time ~~and~~ but proceeded ~~ing forward~~ with a trial that used attorney Stenger, and thereafter obtained ~~ing~~ findings of fact ~~law~~ and conclusions of law from him. This in no~~w~~ way ~~could~~ supports that Havens or these "Havens" ~~e~~ Companies had delayed the proceeding or disrupted it or ~~that they~~ should have been excluded from it. ~~the hearing. since if that were the case~~ Rather, if f they disrupted, then Judge Sippel had a first duty issue a warning to stop it. ~~and take any action prior to continuing on to trial and to obtaining findings of law and conclusions of fact.~~ The fact that, after the filing of the October 27 Motion, Judge Sippel continued to ~~a~~ the trial using and ~~then~~ accepted filings by Stenger, Havens and ~~the "Havens" e~~ Companies, ~~including findings of fact law and conclusions of , without first excluding Havens and "Havens" Companies before wasting time on those matters~~, shows that FCC 15M-14 and the Order are erroneous in their assertions because there was no real delay or disruption of the 11-71 hearing proceeding on its sole Issue (g) ~~since the hearing was completed~~. FCC 15M-14 was ~~not~~ released ~~until~~ months after this ~~the hearing~~ trial on Issue (g) was concluded and ~~merely~~ awaiting the Judge's ~~final~~ ruling. The time for Judge Sippel to exclude Havens or "Havens" companies for alleged bad actions related to the October 27 Motion and at any dates prior to that, was before the trial commenced and before parties submitted their closing briefs and conclusions of law and findings of fact, not after. Otherwise, it

means that Judge Sippel and the Commission are arguing that Judge Sippel's decision to ~~allow~~ hold the trial in December and the subsequent closing briefing was a waste of everyone's time and resources, since the October 27 Motion and other alleged bad actions by Havens preceded those events, and this would cause a mistrial by allowing disqualified parties to prosecute it (the Enforcement Bureau was on the MCLM side as the trial transcripts and other records show): indeed, this is one 15M-14 ramification.

Also, FCC Section 1.251(f) has a subsection, Section 1.251(f)(2), on dealing with an attorney who files an improper motion for summary decision, but FCC 15M-14 and FCC 18-168 do not take any action under that part of Section 1.251(f)(2) or the related Section 1.24. FCC 15M-14 took no action against the attorney who is directly being criticized for filing the October 27 Motion, James Stenger at the Chadbourne firm. FCC 18-168 is not taking any action against James Stenger for the October 27 Motion or the multiple Chadbourne attorneys who filed the April 29, 2015 Interlocutory Appeal or the May 22, 2015 Petition for Reconsideration, or against the attorneys at the Lowenstein firm who filed the Supplement to Interlocutory Appeal and Reply that are discussed in the Order between paragraphs 62 to 68. However, in this case, the ALJ in writing FCC 15M-14 and the Commission in writing the Order have the full record, and must know that they cannot attribute to Havens these alleged improper actions of attorneys representing "Havens" companies. There is nothing in either of those orders that charge Havens with forcing the attorneys to submit their filings, including appeals of FCC 15M-14, or to take any ~~other~~ action, or that misled those attorneys. Further, the Chadbourne ~~and Parke~~ May 22, 2015 Petition for Reconsideration makes clears that Havens, who was not present at the hearing, as manager of ENL and VSL at the time, relied on advice of counsel that permission had been granted by the ALJ to file a motion for summary decision. The May 22, 2015 Petition for Reconsideration of FCC 15M-14 states at Section C, page 5 (emphasis added):

> Prehearing conferences with multiple parties are contentious and confusing. It is possible that your Honor believed he was ruling on some issue not related to ENL-VSL's right to file a motion for summary decision. Nevertheless counsel for ENL-VSL reasonably relied upon your oral ruling and authorization to file "any motion" provided that it was professional. There is no accusation that the motion was unprofessional. **In addition, Mr. Havens, the manager of**

ENLVSL, who is not an attorney, reasonably relied upon the advice of undersigned counsel, that permission was granted at the Prehearing Conference to file a motion for summary decision.

The Chadbourne firm's May 22, 2015 Petition for Reconsideration at Section B, pages 4-5, also makes clear that the October 27 Motion was by its attorney and that it was not submitted in defiance of FCC 15M-14. It stages at pages 4-5:

> These findings are mistaken, as demonstrated by the above-quoted conversation between counsel for ENL-VSL and your Honor at the Prehearing Conference. Counsel for ENL-VSL did not "defy" the July 15, 2014 Order, because he obtained prior approval from you at the Prehearing Conference to file the Motion, provided that it was filed in a "professional" manner, and there is no allegation in that regard.

By the May 22, 2015 Petition for Reconsideration, the Chadbourne firm ~~is clearly~~ stands ~~ing~~behind the ~~filing of the~~ October 27 Motion by its attorney, ~~that it was signed by its attorney,~~ that there was good ground to support it ~~per said attorney~~, and ~~it~~ makes clear that Havens reliance ~~ed~~ upon ~~advice of~~ counsel in ~~that~~ the motion was permitted. However, FCC 15M-14 and the Order seek to punish Havens and ~~the~~ ~~"Havens"~~ c Companies for that motion's filing, while not taking ~~any~~ action against Chadbourne attorneys that their filings were in bad faith or the like. ~~unprofessional or patently frivolous.~~

Since the gravamen of FCC 15M-14 appears to be the October 27 Motion, then that required the ALJ to proceed with action under Section 1.251(f)(2), but the ALJ did not do that and it is now too late to do that. Further since the gravamen of the Order also appears to be the October 27 Motion and the related appeals of FCC 15M-14, and since all of those were filed by legal counsel, then any assertion that they are frivolous or in bad faith or "untenable", requires that the Commission take action under Sections 1.17 and 1.52. FCC 15M-14 and the Order cannot find filings by attorneys to be sufficient for exclusion of Havens and the "Havens" companies from the hearing, and for possible imposition of other sanctions, and yet not find the attorneys sanctionable. By not having taken action against the attorneys who made the filings that are complained of, the ALJ and the Commission have waived their claims that the October 27 Motion and appeal filings violated any rules or are sanctionable, because if they were, then the ALJ and Commission had to take timely action against

the attorneys who submitted the filings, but they have not for 4 years, and thus the ALJ and Commission's claims must be dismissed as moot. Also, at paragraph 68, the Commission interprets Judge Sippel's language "[w]ell, you're free to file any motion you care to, as long as you do it in a professional manner," to only mean that the parties were free to file a motion to strike and not "any" motion. However, that is not what the Judge said, and not what the term "any" means in the English language. The Order errs in limiting what the Judge said to mean only a motion to strike. Havens notes herein that much of the Maritime proceeding originates from Auction 57 in which Maritime changed its bidding credit and should have been disqualified, if not for the FCC arguing that Section 1.2105's language that "any" change in bidding credit would be disqualifying only means a change going up and not down. And here again in this proceeding, the FCC is limiting the meaning of "any" to apparently suit its position, to the extreme detriment of Havens.

9.b. Charge of Havens Attorney-Client-Information "Blocking" Has Been Decided in Havens Favor (As it Had to Be) and Cannot Be Reopened

The ALJ Sippel brought this matter, on false charges as the record shows. [----] Havens had explained in pleadings that he may use assistance of non-representative counsel prior to the trial, and planned to have representative counsel for the trial, which he did. In addition, there is no bar to "ghost writing" in the District of Columbia or in any FCC rule. Further, Havens filed interlocutory appeals of this matter, and while pending, the ALJ gave up this pursuit and the Commission then issued a decision calling the appeals moot.[14] [----] Thus, this matter was resolved in Havens favor or at least resolved without any residual charges, and the matter has been closed for over four years. It is highly improper to raise this in the Order.

9.c. Charge of Havens Misuse of FOIA Has Been Decided in Havens Favor, is Under a Hearing Rule, and Both Are Ignored in the Order

The Order ignores that shortly before the Order the Commission granted in part the FOIA

[14] These interlocutory appeals were not moot as to the wrong action by the ALJ to invade attorney client privileges, and to cost counsel assisting Havens costs and burdens resulting in their terminating assistance, as the ALJ may have intended. These appeals were never properly decided by the Commission. (The Commission acted fairly promptly on these appeals as it must on any interlocutory appeals, since the disposition affects the ongoing hearing. That the Commission did not do so regarding the Order's decisions on the challenges to FCC 15M-14 makes the Order properly time barred as shown herein.)

appeal by Havens [---]. Thus, the Order errs in this matter. It should explain this FOIA decision part in Havens favor, and not his pending appeal of the part not in his favor, a copy of which is Exhibit D hereto. In addition, as Exhibit D shows, a FCC rule under the formal hearings set of rules, pre-scribes use of FOIA to obtain relevant Commission records for a hearing. In addition, as Exhibit D shows, it was improper for the subject Protective Order to bar Havens from access to documents labelled as under the Protective Order. In addition, it was no less than nonsense, a bad joke, for the FCC to withhold documents publicly available on PACER under one of the relevant FOIA request: it took about four years for the Commission to admit to the bad joke, in the noted recent appeal decision-- and still the Commission continues with this in the Order issued ~~s~~ soon thereafter. In addition, the Order also effectively admits, by designating a (to be named) "separate" team at the Enforcement Bureau that its staff involved in the subject subject 11-71 proceeding acted improperly, in abandoning its duties assigned by the Commission in FCC 11-64 to take other, ~~side, the~~ MCLM side. The FCC allowed this compromised Enforcement Bureau that acted against the Commission's case, where Havens and Companies prosecuted the Commission's case, handle ~~Petitioner~~ Havens's FOIA requests.

9.d. <u>The Order, Contrary to Policy and Law, Cites to Matters Outside the Subject Proceeding (11-71), and Mischaracterizes Them</u>

This is presented in the Initial Petition. See also FCC 12-26 referenced in the Order. The Commission has not yet addressed directly the substance of Havens pending challenge to FCC 12-26 and the preceding decisions in that proceeding. Havens fully prevailed on the purposes of that proceeding (in 11-71 in parallel aspects), as his filings explained, and the FCC failed to ever show what the FCC stated it would do and had an obligation to do under equal-treatment due process under the Fifth Amendment: to apply to Havens the same standard it applied to the competitor Mobex-MCLM, or to apply its ~~on~~ precedent that Havens cited in these cases: that ~~is~~ it can and should respond to a late-filed petition for reconsideration under rule §1.106 where clear matters of public interest are shown, as Havens did show and prevailed upon.

9.e. As in FCC 15M-14, the Order Continues with False Charges Not In the Record and Contrary to Law, and the FCC Has Waived Claims Otherwise

See herein passim, including § 9 above and § 14 below: ~~Re the Telesaurus v. Radiolink Case. The Order cites to an FRCP 11 sanction issued by an Arizona US District Court Judge regarding one of the "Havens" companies, as if that is attributable to Havens, but that proceeding shows that the sanction was not attributed to Havens, but involved the filings by a well-established law firm that Havens did not mislead or control. This Order improperly cites to a decision outside the FCC, as shown in the Initial Petition, and apparently the Commission has not even read that proceeding in its suggestion that the FRCP 11 sanction is attributable to Havens.~~

10. LACK OF REASONED DECISIONS REQUIRE ORDER REVERSAL

The Order fails to give the reasons decision - statement of grounds for the aspects that contain denials (denials, dismissals and the like) which is requirement of due process, and included in the APA including here: (underlining added):

> 5 U.S.C. § 555. Ancillary matters: ... (e) Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.

11. FINDING NEED OF "SEPARATE" ENFORCEMENT BUREAU TEAM ADMITS TO MISTRIAL OF MARITIME IN 11-71, RENDERS VOID OR REQUIRES REVERSAL

This is Apparent in the Order and record.

12. ALJ FINDING OF VALID MCLM SITE LICENSES, REQUIRES ORDER REVERSAL OF DECISIONS CITED IN ORDER ON HAVENS SITE APPLICATIONS UNDER 5TH AMENDMENT

This is Apparent in the Order and record.

13. THE ALLOWANCE OF OPPOSITIONS AGAINST THE CHALLENGES OF THE "CHARACTER" PART OF FCC 15M-14'S WAS IMPERMISSIBLE AND REVERSIBLE ERROR

The procedures permitted regarding the challenges to the ALJ's Order 15M-14 (the core subject of the Order), were impermissible, in allowing parties other than Havens and the Companies to defend 15M-14 referral on character fitness. Thus, the Order is invalid since due process was violated in this manner (in addition to others ~~manners described~~ herein). ~~As t~~ The Commission wrote (underlining added):

> l2. Section 312 of the Communications Act ....does not ... authorize the filing of petitions for revocation, again in contrast to Section 309....See generally *MCI Telecommunications Corporation,* 3 FCC Rcd 509, 513-14 1146-48, 515 n.18, supplemented, 4 FCC Rcd 7299 (1988), appeal dismissed sub nom. *TeleStar, Inc. v. FCC,* 901 F.2d 1131 (D.C. Cir. 1990).

14. OTHER MATTERS

(1) Order's Ordering Clauses Do Not Dispose of the Lowenstein law firm Supplement to Interlocutory Appeal and Reply. The ordering clauses on page 29 of the Order do not address and dispose of the principle appeal pleadings challenging FCC 15M-14, which are the *Supplement to Interlocutory Appeals,* filed September 11, 2015 and the *Reply to Oppositions to Supplement to Interlocutory Appeals,* filed October 8, 2015, both by attorneys Jeffrey Blumenfeld and Hilla Shimshoni at the Lowenstein Sandler LLP law firm, as counsel to Havens and the "Havens" companies. Therefore, the Order is ineffective in not disposing of, one way or the other, those main challenges to FCC 15M-14. Havens raised this defect in his Initial Petition. (2) Order's Listing of the Receivership Litigation for the Inquiry. The Order at its paragraph 83 states that Havens was prohibited by the conditions of the receivership from communicating with the FCC about the FCC licenses and the Receivership Entities, and then states that Havens was found in contempt by the court for his conduct in the receivership. The Order fails to clearly explain that California Court of Appeals issued an Alternative Writ that vacated the contempt charge against Havens for his September 2, 2016 filing at the FCC, and that the California Court of Appeals stated in its Order Issuing Alternative Writ of Prohibition that the "most reasonable construction of respondent's orders" is that Havens is "permitted to communicate with the FCC as long as he clearly indicated he was not speaking on behalf of any Receivership Entity" (Exhibit E). Havens has informed the FCC that the contempt order regarding his FCC filing was vacated by the California Court of Appeals and that he is not prohibited from communicating with the FCC. However, in the Order the FCC continues to suggest that Havens is prohibited from communicating with the FCC as a condition of the receivership. The Order also fails to recognize that any such condition on Havens would clearly be a violation of Havens' First Amendment rights under the Constitution and federal law, which the FCC as a federal agency is supposed to uphold and defend over any state court action or ruling. Instead of citing to an improper prohibition in the receivership order, the Commission should have raised serious questions as to why Arnold Leong, the person who obtained the receivership, included language in the receiver-

ship order to unlawfully gag Havens from communicating with the FCC, especially where Leong is claiming in his state court filings, copies of which his attorney Stephen Coran gave to the FCC, that he has always been a co-controller in the receivership entities, when Arnold Leong never presented his claims to the FCC and such claims would be illegal under FCC rules. (3) Order Continues to Avoid MCLM Fraud that Delayed Hearing for Years. In the 11-71 hearing, Havens' whistleblowing was successful in getting MCLM to (1) admit permanent abandonment of most of its site-based stations, (2) assert that its station records were destroyed when they were not (and Havens successfully found and preserved those key station records for the FCC), (3) to seek Second Thursday relief because Havens showed with sufficient facts that MCLM had clearly misrepresented and cheated at auction as shown in FCC 11-64. The Commission in the Order, as did ALJ Sippel, continues to entirely ignore that MCLM admitted in the 11-71 hearing, by its admissions and stipulation, that it had kept invalid, auto-terminated site-based stations for up to two years prior to its admission, without ever turning them back in for cancellation at the time of said auto-termination, and more importantly without ever advising Judge Sippel or the FCC of those facts at the time of their occurrence (Section 1.65 requires timely updates). That wasted over 2 years of hearing in 11-71 on stations that were already auto-terminated, but which MCLM sought to keep or use to bargain. That was clearly fraud by MCLM, and was much worse bad faith action and delay by MCLM, than whatever the ALJ or Commission are alleging Havens or the "Havens" ~~e~~ Companies did. Yet, the ALJ and the Commission have not indicated they will be taking any sanction action whatsoever against MCLM. If MCLM had admitted ~~to that~~ at the time of the stations' auto-terminations to that, ~~then~~ that would have reduced the number of site-based stations in dispute to just 16 or so at least two years prior to the trial, which would have greatly reduced all of the issues and proceedings that occurred during that two-year minimum period. By that eventual actual admission alone, MCLM should have been (and still should be) found to be disqualified as a licensee. No hearing was needed because MCLM admitted to it. The ALJ and the Commission cannot on the one hand seek to punish Havens and the "Havens"

companies for filing of a purported bad faith motion and alleged bad actions, and on the other hand not take any action at all against MCLM after it admitted to fraud for keeping dead licenses for years that were the subject of Issue (g) in the 11-71 hearing. This shows egregiously inequitable and prejudicial treatment of Havens and Companies against 5th Amendment equal treatment due process. ~~for alleged bad actions versus MCLM's admitted wrongdoing actions in the 11-71 hearing~~. As such, the Order should be overturned. ~~on reconsideration~~. (4) Telesaurus v. Radiolink Case. The Order cites to an FRCP 11 sanction issued by an Arizona US District Court Judge regarding one of the "Havens" companies, as if that is attributable to Havens, but that proceeding shows that the sanction was not attributed to Havens, but involved the filings by a well-established law firm that Havens did not mislead or control. This Order improperly cites to a decision outside the FCC, as shown in the Initial Petition, and apparently the Commission has not even read that proceeding in its suggestion that the FRCP 11 sanction is attributable to Havens. See above on FRCP 11 matters.

Page length: Under rule §1.49, the page length of the text above., excluding parts at the start that are not counted, are 19.5 pages. The referenced and incorporated text from the Initial Petition, Exhibit 2, (see § 2 above) are sections 2 and 3, which are 4.5 pages if top and bottom margins were set to .75 inches, no points added between paragraphs, and Palatino type used (all permitted by this rule). Thus, the total page length of this Petition is 24 pages, or less excluding the above strike through text. See also § 3.

CONCLUSION

The requested relief should be granted for reasons given herein.

Respectfully submitted,

Warren Havens,
Individually

Warren Havens
President,
Polaris PNT PBC
Polaris PNT 1, PB LLC
Polaris PNT 2, PB LLC
Polaris PNT 3, PB LLC

Date and Contact information is on the Caption page.

Errata copy, January 2, 2019

DECLARATION

I, Warren Havens, declare under penalty of perjury that the foregoing filing was prepared by me and that the factual statements and representations contained herein known to me are true and correct.

Warren Havens

December 31, 2018

CERTIFICATE OF SERVICE

I, Warren C. Havens, certify that I have, on December 31, 2018: [*]1/ (Errata copy on 1-2-2019):

(1) Caused to be served, by placing into the USPS mail system with first-class postage affixed unless otherwise noted below, a copy of the foregoing filing to the following[*]2/

David Senzel
Email to: David.Senzel@fcc.gov

Jane Hinckley Halprin[15]
Chief Administrative Law Judge
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

"Separate Team" lead[16]
FCC Enforcement Bureau
445 12th Street, SW
Washington, D.C. 20554

Robert J. Keller, Law Offices
P.O. Box 33428
Washington, DC 20033-0428
(Counsel to Maritime, DIP)

Wilkinson Barker Knauer, LLP
ATTN Mary N. O'Connor
1800 M Street, NW, Suite 800N
Washington, DC 20036
(Counsel to Choctaw)

Jeffrey L. Sheldon
Levine, Blaszak, Block & Boothby, LLP
2001 L Street, NW, Suite 900
Washington, D.C. 20036
(Counsel for Puget Sound Energy, Inc.)

Jack Richards, A. J. Catalano, W. Wright
Keller & Heckman LLP
1001 G Street, NW, Suite 500 West
Washington, D.C. 20001
(Counsel to Enbridge; Dixie Electric; EnCana; Jackson Co. RMEC; DCP Midstream; Atlas)

Charles A. Zdebski, Gerit F. Hull
Eckert Seamans Cherin & Mellott, LLC
1717 Pennsylvania Avenue, NW
Washington, D.C. 20006
(Counsel for Duquesne Light)

Matthew J. Plache
5425 Wisconsin Avenue, NW
Suite 600, PMB 643
Chevy Chase, MD 20815
(Counsel for Pinnacle Wireless)

Paul J. Feldman, Harry F. Cole
Fletcher, Heald & Hildreth, P.L.C.
1300 N. 17th Street, 11th Floor
Arlington, VA 22209
(Counsel, So. Cal. Regional Rail Authority)

Arnold Leong
Abe Pacific Heights...LLC
Hippy and Happy, LLC
3111 Green River Drive
Reno, NV 89503

(2) Caused to be filed the foregoing filing as stated on the caption page, and thus, as I have been instructed, [**]3/ provide notice and service to any party that has or may seek to participate in Dockets 13-85 and 11-71. (3) Caused to be emailed the this filing to: David Hunt, Inspector General, David.hunt@fcc.gov; and Christopher.shields@fcc.gov.

/s/ Warren Havens

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[*]1. The mailed service copies being placed into a USPS drop-box today may be after business hours and thus may not be processed and postmarked by the USPS until the next business day (Jan, 1 is a federal holiday).

[*]2. Petitioner does not believe other persons are parties in matters under the Order (and no person has informed me otherwise) and some listed above may not be or represent listed parties regarding the Order.

15 December 1, 2018 replaced ALJ Richard Sippel.

16 A "separate team" for the inquiry described but not identified in the Order.

[**]3/ The FCC Office of General Counsel informed me of acceptable filings and service in this fashion.